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Supreme Court, U.S.
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No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

JAMES H. GALLEGOS
LAWRENCE M. STROIK
BNSF RAILWAY CO.
2500 Lou Menk Drive,
AOB-3
Fort Worth, TX 76131-2828
(817) 352-2379

BRYAN P. NEAL
THOMPSON & KNIGHT LLP
1700 Pacific Avenue
Suite 3300
Dallas, TX 75201
(214) 969-1700

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ERIC A. SHUMSKY
EAMON P. JOYCE
THOMAS A. BURNS
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

November 14, 2005 * Counsel of Record

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

RALPH T. GIBSON
BATEMAN GIBSON, LLC
65 Union Avenue, Ste. 1010
Memphis, TN 38103
(901) 843-2466

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), formerly known as Burlington Northern Santa Fe Railway Co., is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation. No publicly held company owns 10% or more of the stock of Burlington Northern Santa Fe Corporation.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
REPLY BRIEF	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Bennett v. *Total Minatome Corp.*, 138 F.3d 1053 (5th Cir. 1998) 4
Benningfield v. *City of Houston*, 157 F.3d 369 (5th Cir. 1998) 5
Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 8
Breaux v. *City of Garland*, 205 F.3d 150 (5th Cir. 2000) 5
Brown v. *Brody*, 199 F.3d 446 (D.C. Cir. 1999) 6
Burger v. *Central Apt. Mgmt., Inc.*, 168 F.3d 875 (5th Cir. 1999) 3
Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) 1, 3, 4, 5
City of Springfield v. *Kibbe*, 480 U.S. 257 (1987) 8
City of St. Louis v. *Praprotnik*, 485 U.S. 112 (1988) 8
Conley v. *Village of Bedford Park*, 215 F.3d 703 (7th Cir. 2000) 6
Crady v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132 (7th Cir. 1993) 7
Gasoline Prods. Co. v. *Champlin Ref. Co.*, 283 U.S. 494 (1931) 10
Hardin v. *Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000) 10
Harlston v. *McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994) 7
Harper v. *City of Jackson Mun. Sch. Dist.*, No. 05-60232, 2005 WL. 2404813 (5th Cir. Sept. 30, 2005) 3, 4
Hernandez v. *Crawford Bldg. Material Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 540 U.S. 817 (2003) 2, 4

TABLE OF AUTHORITIES—continued

	Page
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	2
Mattern v. *Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997)	6
Mota v. *University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001)	4
Pennington v. *City of Huntsville*, 261 F.3d 1262 (11th Cir. 2001)	7
Ray v. *Henderson*, 217 F.3d 1234 (9th Cir. 2000)	3
Sharp v. *City of Houston*, 164 F.3d 923 (5th Cir. 1999)	3, 4
Taylor v. *Small*, 350 F.3d 1286 (D.C. Cir. 2003)	7
Texas Dep't of Comty. Affairs v. *Burdine*, 450 U.S. 247 (1981)	9
Thomas v. *Texas Dep't of Criminal Justice*, 220 F.3d 389 (5th Cir. 2000)	4
Walker v. *Thompson*, 214 F.3d 615 (5th Cir. 2000)	4
Watts v. *Kroger Co.*, 170 F.3d 505 (5th Cir. 1999)	4
Woodby v. *INS*, 385 U.S. 276 (1966)	10

STATUTE

42 U.S.C. § 1983	3

RULE

5th Cir. L.R. 47.1a	3

SCHOLARLY AUTHORITIES

9A Wright & Miller, *Federal Practice and Procedure* (2d ed. 1995 & Cum. Supp. 2005)	8
2 Lex K. Larson, *Employment Discrimination* (2d ed. 2005)	2

REPLY BRIEF

In its petition, BNSF demonstrated a deep, three-way division of authority among the federal courts of appeals on the proof necessary for employer liability under Title VII's anti-retaliation provision. Respondent grudgingly acknowledges a conflict between the court below and at least the Fifth Circuit, but claims that this case is not a good vehicle for resolving it. Her theory is that BNSF would not prevail under the Fifth Circuit standard, and that BNSF did not preserve the question presented. The Fifth Circuit, however, has expressly held that neither interim employment actions nor undesirable work assignments are actionable under Title VII. Thus, that court would grant BNSF judgment as a matter of law on respondent's claims of retaliation based on relief of her forklift duties and her temporary suspension pending an investigation that led to her reinstatement with full back pay. In any event, multiple circuits (not just the Fifth) have held that corrected actions and altered job duties do not constitute retaliation that is actionable under Title VII. Finally, contrary to respondent's claims, BNSF preserved the question presented in its motions for judgment as a matter of law at trial. Nothing more is needed to preserve the question for review.

Respondent's brief in opposition is remarkable for what it does not contest. It does not dispute that there is a substantial conflict in the circuits (not limited to the Fifth Circuit) over whether a supervisor's retaliation that is corrected by management is actionable. Nor does it contest that the Sixth Circuit's rule is irreconcilable with this Court's decision in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). Indeed, despite the extensive analysis of *Ellerth* in the petition, Pet. 12-13, 19, respondent does not so much as cite that decision, much less discuss or distinguish it. This Court should grant the first question presented to resolve the mature conflict on retaliation liability, and the second question to resolve both the standard of proof for punitive damages and the permissibility of having a second jury in a punitive damages trial

retry the same facts that already are the basis of the judgment on liability and compensatory damages.

1. As numerous courts of appeals and scholars have commented, there is a deep and mature three-way circuit split on the question of what conduct creates employer liability for retaliation under Title VII. Pet. 10-17; 2 Lex K. Larson, *Employment Discrimination* § 34.04, at 34-47 (2d ed. 2005). At least five courts of appeals have acknowledged this division of authority, including the decision below. See Pet. 10.

Respondent concedes that there is a conflict in the circuits. Opp. 1 ("The Fifth Circuit's 'ultimate employment decision' standard may lead in some cases to a result different from that under the standard in the other eleven circuits."). Indeed, the Fifth Circuit itself has stated that "[o]ur court has analyzed the 'adverse employment action' element in a stricter sense than some other circuits.'" *Hernandez* v. *Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir.), *cert. denied*, 540 U.S. 817 (2003).

Respondent insists, however, that there is no *three-way* split on this issue. Specifically, she argues that there is no conflict between the Sixth and Ninth Circuits because the latter "uses a number of different alternative formulations interchangeably to characterize those retaliatory actions which are significantly adverse to be actionable," and some have a similar ring to the Sixth Circuit's "materially adverse" standard. Opp. 21-22. This argument is irrelevant, even were it correct, because a mature two-way split, even a lopsided one, warrants this Court's intervention. *E.g.*, *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 125 n.8 (1990). But the argument is wrong in any event. The Sixth Circuit expressly "reject[ed]" the Ninth Circuit standard, precisely because the Ninth Circuit does not limit liability to actions that materially affect the "terms and conditions" of employment. Pet. App. 18a. Other courts have done likewise. See Pet. 15-16. There is an entrenched, three-way split in the circuits on this question, spearheaded by the Fifth, Sixth, and Ninth Circuits, even

if it is less clear in which camp the other circuits fall. This Court's intervention is fully warranted.[1]

2. BNSF clearly would have prevailed under the Fifth Circuit's "ultimate employment decision" standard, and respondent's argument to the contrary is based on a mischaracterization of Fifth Circuit precedent. Respondent cites only two Fifth Circuit cases in support of her claim: *Harper* v. *City of Jackson Mun. Sch. Dist.*, No. 05-60232, 2005 WL 2404813 (5th Cir. Sept. 30, 2005), and *Sharp* v. *City of Houston*, 164 F.3d 923 (5th Cir. 1999). Opp. 17. Neither supports her argument, and *Harper*, while citable, is not Fifth Circuit precedent in any event. See 5th Cir. L.R. 47.1a.

These cases stand for the proposition, undisputed by BNSF, that reassignment to a new *position* in the company, with such different responsibilities that the transfer amounts to a demotion, is actionable as an ultimate employment decision even in the absence of changed pay or benefits. *Sharp* held that "'a transfer may ... constitute a demotion'" if "the *new position* proves objectively worse." 164 F.3d at 933 & n.2 (emphasis added) (jury could find "transferring from the elite Mounted Patrol to a teaching post at the Police Academy" to be a demotion)[2]; *Burger* v. *Central Park Apt. Mgmt., Inc.*, 168 F.3d

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[1] While BNSF does not advocate the Ninth Circuit standard, respondent incorrectly states that BNSF would not be entitled to reversal if this Court adopted the Ninth Circuit rule because "Petitioner clearly would lose under the Ninth Circuit standard." Opp. 1, 22. That would be an issue for the jury to decide, not respondent. The question of whether an action is "materially adverse" under the Sixth Circuit standard is separate and distinct from whether "'any adverse treatment ... is reasonably likely to deter the charging party or others from engaging in protected activity.'" *Ray* v. *Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). The latter test is concerned not only with materiality, but also likelihood of deterrence. The jury below did not find that the alleged such actions were likely to deter protected activity. If this Court were to embrace the Ninth Circuit's standard, the proper course would be to remand for a new trial under that standard. *Ellerth*, 524 U.S. at 765-66.

[2] *Sharp* arose under 42 U.S.C. § 1983, not Title VII. The Fifth Circuit held that, although there may be differences between section 1983 and

875, 879 (5th Cir. 1999) (transfer to an inferior position is actionable, but lateral transfer is not actionable even if it affects working conditions). But the Fifth Circuit has expressly held that "ultimate employment decisions" do not include "loss of some job duties," an "assignment to [a] less desirable shift and formal discipline," "removal from duties on [a] particular account," or a "request that [the] employee perform new job tasks." *Hernandez*, 321 F.3d at 532 n.2.[3] As the very case respondent cites succinctly puts it, in a passage she fails to quote: "undesirable work assignments are not adverse employment actions." *Harper*, 2005 WL 2404813, at *7 (alteration omitted) (quoting *Southard* v. *Texas Bd. of Criminal Justice*, 114 F.3d 539, 555 (5th Cir. 1997)).

These are the same distinctions that *Ellerth* drew in defining "tangible employment actions" under Title VII:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits.... A tangible employment action in most cases inflicts direct economic harm.

524 U.S. at 761-62 (emphasis added). Reassignment to a different and demonstrably worse position in the company may constitute "a significant change in employment status" akin to hiring, firing, failure to promote, or reduction in pay or benefits. But where (as here) the employee maintains the exact same position, at the same location with the same seniority,

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Title VII standards, a transfer resulting in demotion would be an "adverse employment action" under either law. 164 F.3d at 933 n.2.

[3] *See Mota* v. *University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389, 394 (5th Cir. 2000); *Walker* v. *Thompson*, 214 F.3d 615, 629 (5th Cir. 2000); *Watts* v. *Kroger Co.*, 170 F.3d 505, 511-12 (5th Cir. 1999); *Bennett* v. *Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998) (requiring employee to perform manual tasks not an ultimate employment decision).

and is simply given different (arguably less desirable) tasks, that is not a change in employment status that is actionable under *Ellerth* or Fifth Circuit precedent. That is particularly so when the tasks are within the employee's craft and job description, and are responsibilities that she and other employees in the same job classification already perform. Pet. 11-13. Unlike an actual job transfer, a supervisor's decision to relieve an employee of certain preferred tasks does not "require[] an official act of the enterprise, a company act," and is thus not a tangible employment action that can give rise to Title VII liability. *Ellerth*, 524 U.S. at 762.[4]

Finally, as to her other retaliation claim, even respondent does not go so far as to claim that a temporary suspension without pay that is *reversed* and *corrected* with full back pay by senior management would constitute an "ultimate employment decision" under Fifth Circuit law. Rather, respondent weakly argues that petitioner does not cite a case to that effect from the Fifth Circuit. Opp. 18 & n.21. But an "ultimate employment decision" by definition excludes interim, reversible, and reversed actions, and the Fifth Circuit, like other courts of appeals, indeed has held that such supposed retaliation is not actionable. *Breaux* v. *City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000); *Benningfield* v. *City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998) ("[Because] the reprimand was rescinded through internal ... procedures ... [it] does not constitute an adverse employment action."); 157 F.3d at 378 ("We need not address whether a mere delay in promotion constitutes an adverse employment action because Benningfield received the promotion with retroactive pay and seniority."). "Title VII's anti-retaliation provision refers to

[4] Respondent tries to escape the force of these decisions by characterizing her forklift duties as a "forklift position." Opp. 3. But the undisputed evidence is that there is no such classified position (as Respondent concedes, *see id.*); that at all relevant times Respondent was a "track laborer"; and that she performed other tasks besides driving the forklift. Pet. 4; *see* II Trial Tr. 194-96 (Respondent worked in "the yard," and spent a "good bit of [her] time to assist in maintaining the switches" on the tracks).

ultimate employment decisions, and not to an 'interlocutory or mediate' decision which can lead to an ultimate decision." *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997). That necessarily excludes temporary suspensions with pay that are rescinded by senior management.[5]

3. In short, Fifth Circuit law starkly conflicts with the rule adopted below, and it favors BNSF. And, in any event, the conflict of authority extends well beyond the Fifth Circuit on the issues presented in this case. Respondent claims that because other circuits use nomenclature similar to the Sixth Circuit's, they would reach the same result in this case. Opp. 19-23. That is not so. As to both changes in work duties and corrected supervisory actions, the decision below is in conflict with multiple courts of appeals, regardless of those courts' verbal formulation of the general standard.[6]

BNSF and its *amici* have demonstrated that at least three other circuits have joined the Fifth in rejecting the Sixth Circuit's position that a change in work duties can constitute actionable retaliation. Pet. 14-15 & n.4; Br. of *Amicus Curiae* Association of American Railroads ("AAR Br.") at 5-7.[7]

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[5] Respondent now states that she was "'discharged'" or "'dismissed," rather than suspended. Opp. 5-6. This assertion, immaterial in any event to the decision to grant certiorari, is directly contradicted by respondent's own trial testimony, *see* II Trial Tr. 187; *see also id.* at 215, as well as her complaint, *see* Compl. at 5 (6th Cir. J.A. at 16), and the charge she filed with the EEOC, *see* 6th Cir. J.A. at 28 ("I was put on suspension pending an investigation."), in each of which she referred to her "suspension."

[6] Similar to respondent's quibble over verbal formulations of the legal standard, she also argues that this case is fact-bound. Opp. 19. This argument misses the point. The dispute here is not over facts—BNSF challenges the *legal rule* below that alternate work assignments and rescinded suspensions are actionable under Title VII.

[7] *See Conley* v. *Village of Bedford Park*, 215 F.3d 703, 712 (7th Cir. 2000) (no adverse employment action because "the assignment seems to be well within the scope of normal activities for a Village maintenance worker"); *Brown* v. *Brody*, 199 F.3d 446, 451-52 (D.C. Cir. 1999) ("changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in

Similarly, BNSF and its *amici* have shown that, in conflict with the Sixth Circuit, at least five circuits—the Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits—hold that "[a]n employer may cure an adverse employment action ... before that action is the subject of litigation." *Taylor* v. *Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *Pennington* v. *City of Huntsville*, 261 F.3d 1262, 1267–68 (11th Cir. 2001) ("the employment action is not adverse ... when the action is rescinded and backpay is awarded."); see Pet. 16-17 & n.5; AAR Br. 8-9. Other than her argument about Fifth Circuit case law (which is mistaken in any event, see *supra* at 3-6), respondent does not even address this conflict.

4. Unable to rebut the circuit conflicts, respondent is left to argue that BNSF did not preserve the question presented, purportedly because BNSF did not ask for "an ultimate employment decision" jury instruction and instead embraced the "materially adverse" standard. Opp. 10-16. This argument is unsound in multiple respects.

As an initial matter, respondent mischaracterizes BNSF's position. BNSF has never claimed that courts must adopt a specific verbal formulation of the Title VII retaliation standard. Whether this Court chooses "ultimate employment decision," "tangible employment action," or "materially adverse

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salary or work hour changes"); *Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994); *Crady* v. *Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) ("mere inconvenience or an alteration of job responsibilities" not enough). Respondent attempts (Opp. 22-23) to distinguish one of these cases, *Crady*, by pointing to language that an actionable demotion can be proven by "other indices that might be unique to a particular situation." 993 F.2d at 136. But *Crady*—which addressed the demotion and transfer of an assistant vice president and manager at one bank location to loan officer at another location, *id.* at 133—holds that whether a job *transfer* can be considered an actionable demotion may be proven by factors other than decreased pay and benefits or "significantly diminished material responsibilities." *Id.* at 136. It does not hold (as the Sixth Circuit did) that a supervisor's reallocation of duties within the same position is actionable.

employment action" is largely a matter of indifference. The key question is the *content* of the standard, and BNSF's position has always been that the content of the Fifth Circuit's standard is correct. Moreover, BNSF had no reason to quarrel with the Sixth Circuit's "materially adverse" standard at trial because prior to the decision below, BNSF would have prevailed under that standard, which had been interpreted fully consistently with the Fifth Circuit standard. Pet. 13-15; Br. of Equal Employment Advisory Council ("EEAC Br.") at 9 (noting that the Sixth Circuit "so diluted the 'materially adverse' standard as to allow anything to satisfy it, in further conflict with other courts that have adopted the same nominal standard"); Opp. 14 (acknowledging that BNSF has consistently argued prior to the decision below that the Fifth and Sixth Circuit standards were coextensive). Indeed, the panel below, applying prior Sixth Circuit law, ruled in BNSF's favor. Pet. App. 94a-103a.

In all events, respondent's reliance on *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987), is misplaced because BNSF is not claiming instructional error. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-14 (1988). Rather, BNSF's claim is that the alleged retaliation—being relieved of forklift duties, and a suspension without pay that was later rescinded with back pay—are not actionable under section 704 of Title VII *as a matter of law*. There is no dispute that BNSF raised that claim in its motions for judgment as a matter of law (JMOL) both before and after verdict. See III Trial Tr. 688, 694-706; Mem. in Support of Def.'s Mot. for JMOL or, in the Alternative, for New Trial 3-6; Opp. 12-16. When a party raises its defense in a JMOL motion, the point is preserved for review no matter the law on which the jury was instructed. *Boyle*, 487 U.S. at 513-14; *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality); 9A Wright & Miller, *Federal Practice and Procedure* § 2537, at 348-49 & n.14 (2d ed. 1995 & Cum. Supp. 2005); *id.* § 2558, at 460-61 & n.9.

5. BNSF and its *amici* have demonstrated the untoward effects that the Sixth Circuit's broad expansion of Title VII to include claims related to work assignments and temporary suspensions (even when rescinded with full back pay) would have on the nation's employers. Respondent does not respond to the analysis that the rule below would severely prejudice employers in the necessary task of temporarily removing from active service employees whose actions create safety hazards or workplace disruptions. Pet. 19-20; AAR Br. 16-18; EEAC Br. 5-6, 13-16. As to work assignments, no disinterested observer would deem it "wholly salutary" (Opp. 24) to enmesh senior management in scrutinizing every supervisor's task assignments to all employees involved in Title VII charges. Title VII was "not intended to diminish traditional management prerogatives," *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (quotation omitted), nor to force employers to tighten the reins on ordinary supervision of employees simply because a Title VII charge has been filed. Not only would such intervention be wasteful and impractical, but it would be fruitless, because it is impossible to predict in advance what changes in duties might give rise to retaliation claims. Employers would have to treat Title VII plaintiffs and witnesses with kid gloves, sacrificing flexibility to change work assignments to meet operating needs. Such employees would have a trump card that would allow them to slack off with impunity, or to assert job rights that do not exist under their governing labor agreements. Pet. 19-21; AAR Br. 15, 18-19; EEAC Br. 11-12, 15. That is an untenable state of affairs, and this Court should intervene to restore rationality and clarity to Title VII law.

6. This Court should also review the punitive damages rulings of the court below. This Court's consideration of the question of the standard of proof for punitive damages would not be materially enhanced by further treatment in the lower courts. This issue of judicial procedure is straightforward; five circuits have now spoken on one side of the issue; and

Judge Sutton's opinion for the five dissenters below (which respondent concedes is "scholarly and provocative," Opp. 28) presents a cogent and comprehensive exegesis of the case for adopting the modern clear-and-convincing-evidence standard. When the statute is silent, Congress is deemed to delegate specification of that standard to the judiciary; *Woodby* v. *INS*, 385 U.S. 276, 284 (1966), and this Court should adopt the modern rule both now and at the time of the 1991 Act.[8]

Finally, respondents cannot reconcile the decision below with *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and *Hardin* v. *Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000). Those cases hold that when an issue of compensatory or punitive damages is "interwoven with that of liability," there can be no retrial on damages alone. 283 U.S. at 500. Respondent attacks a strawman in arguing that those cases do not say "a separate trial on punitive damages is never permissible." Opp. 29. But here the second jury would have to decide the same facts already decided by the first jury, and thus *Gasoline Products* and *Hardin* are directly on point. Pet. 25-27. The fact that BNSF can move for summary judgment on remand does not counsel against review; that is true whenever a court of appeals grants a new trial under a new legal standard. This Court's review of each of the Title VII and punitive damages questions is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] As respondent concedes, Congress has explicitly chosen the clear-and-convincing standard in federal punitive damages statutes passed *after* the 1991 Civil Rights Act. *See* Opp. 28 n.32. The inference to draw is not (as respondent claims) that Congress wishes to grant a lesser degree of protection to Title VII defendants. Rather, these statutes show that Congress recognizes the need for clear and convincing evidence before punitive damages are awarded, but now must select that standard explicitly given the erroneous case law presuming from statutory silence that Congress intended a preponderance-of-the-evidence standard.

Respectfully submitted,

JAMES H. GALLEGOS
LAWRENCE M. STROIK
BNSF RAILWAY CO.
2500 Lou Menk Drive,
AOB-3
Fort Worth, TX 76131-2828
(817) 352-2379

BRYAN P. NEAL
THOMPSON & KNIGHT LLP
1700 Pacific Avenue
Suite 3300
Dallas, TX 75201
(214) 969-1700

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ERIC A. SHUMSKY
EAMON P. JOYCE
THOMAS A. BURNS
SIDLEY AUSTIN BROWN &
WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RALPH T. GIBSON
BATEMAN GIBSON, LLC
65 Union Avenue, Ste. 1010
Memphis, TN 38103
(901) 843-2466

Counsel for Petitioner

November 14, 2005

* Counsel of Record